87-1753

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

LEWIS duPONT SMITH,

Petitioner,

vs.

E. NEWBOLD SMITH, MARGARET duPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI and HENRY B. duPONT SMITH,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED FOR REVIEW

1. Does the lower courts' inclusion of contributions to national political organizations within the meaning of "liable to become the victim of designing persons", as that phrase is used in the Pennsylvania guardianship statute, offend basic First Amendment principles of freedom of political expression and association?

2. Does the lower courts' inclusion of mere and common personality disorders within the definition of "mental illness" in the guardianship statute offend basic First Amendment principles of freedom of political expression and association?

3. Does the lower courts' construction of the Pennsylvania guardianship statute which fails to limit the definition of "mental illness" and "designing persons" render the statute void for vagueness and impermissibly overbroad?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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E. NEWBOLD SMITH, MARGARET duPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI, AND HENRY B. duPONT SMITH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

The petitioner, Lewis duPont Smith, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania, entered in the above-entitled proceeding on July 21, 1987.

OPINIONS BELOW

The panel opinion of the Superior Court of Pennsylvania (Beck, J., concurring) is reported at 529 A.2d 466, 365 Pa. Super. 195 (1987) and is reprinted in the Appendix hereto, p. 4a, *infra*.

The final order and memorandum decision of the Chester County Court of Common Pleas (Wood, J.) has not been reported. It is reprinted in the Appendix hereto, p. 17a, *infra*.

The adjudication and decree nisi of the Chester County Court of Common Pleas (Wood, J.) is reported at 34 Chester Co. Rep. 93 (1986) and is reprinted in the Appendix hereto, p. 20a, *infra*.

STATEMENT OF JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on July 21, 1987, affirming the trial court's final order dated July 23, 1986, which adjudicated petitioner incompetent within the meaning of the Pennsylvania conservatorship statute. On January 21, 1988, the Supreme Court of Pennsylvania declined to exercise its discretionary review and denied petitioner's request for allowance of appeal; therefore, on that date, the decision of the Pennsylvania Superior Court became the final judgment of the highest state court in which a decision could be had. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

20 Pa. C.S.A. § 5501(1). Meaning of incompetent

"Incompetent" means a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety:

(1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; . . .

STATEMENT OF THE CASE

A. Background

The petitioner, Lewis duPont Smith, the 31 year old son of E. Newbold and Margaret duPont Smith, is the heir to a significant portion of the duPont family fortune. Prior to Judge Wood's

ruling in this case and the Superior Court panel's affirmance thereof, Lewis had direct access to approximately 1.5 million dollars in assets and marketable securities. He also received substantial income from the principal in several irrevocable trusts. His total estate, including trusts, is valued at approximately 8 million dollars.

Lewis graduated from the University of Michigan in 1980 with a Bachelor of Science degree in Liberal Arts and a better than C average. From 1980 until 1984, Lewis held various jobs in sales and teaching. He worked as a sales representative for NBC Sports and Time/Life Incorporated. He also taught at the Hill School in Pottstown, Pennsylvania, and at the Rectory School in Connecticut. He then attended graduate courses in American History at Harvard University in the summer of 1983. Most recently, he taught American History and English to high school students at the Friends Central School in Philadelphia.

Lewis first became aware of the LaRouche political philosophies in the spring of 1983. He began to investigate these ideas and he read their literature. Interested by what he read, he contacted the LaRouche affiliated groups to learn more, particularly regarding LaRouche's views on political economics and its relation to American history, which has always been his main interest.

In the fall of 1984, Lewis obtained materials that LaRouche supporters had published concerning the Civil War because he wanted to introduce these articles as supplements to the texts in an attempt to broaden the perspective of his history classes at Friends Central. As a result of his renewed interest, Lewis researched and studied, went to a national conference, and met with members of the national committee at LaRouche headquarters in Leesburg, Virginia. It was as a result of these activities — nearly two years after his initial exposure — that Lewis decided in January

1985, to become involved and to actively and firmly espouse the ideas and writings of Lyndon LaRouche.

In particular, and these facts are substantially undisputed, petitioner loaned a total of $212,000 (some of which had been paid back) to two organizations that publish and distribute political literature generally supportive of the world view that Mr. LaRouche espouses. In early April, Lewis was planning to make an additional loan of $75,000. He made no secret of his plans and advised a family member.

B. Course of Proceedings Below

On April 11, 1985, upon learning of petitioner's intentions to loan additional money, the parents and siblings of Lewis duPont Smith filed a petition for adjudication of incompetency and appointment of a guardian of his estate as well as a petition for preliminary injunction to prevent Lewis from providing financial support to organizations associated with Lyndon LaRouche and his political beliefs. In these pleadings, the family alleged, pursuant to the conservatorship statute, that petitioner had a "mental illness" which made him "unable to manage his property, or is liable to dissipate it or become the victim of designing persons." The basis for their allegation was petitioner's involvement with and espousal of the politics and ideas of Lyndon LaRouche and his growing support and commitment to organizations which are generally supportive of the views of Mr. LaRouche. On the basis of the family members' bare allegations, Judge Wood granted an *ex parte* preliminary injunction on April 11, 1985.

Several days later, after hearing testimony from Lewis concerning his financial and philosophical commitment to Mr. LaRouche's ideas and others aligned with LaRouche, Judge Wood preliminarily enjoined petitioner from using his money to make "any loan, gift or contribution; whether charitable, political, or

personal . . . [that] directly or indirectly benefit any political or charitable organizations . . . without the prior written approval of this Court. *For purposes of this Order, the term 'political or charitable organizations' shall include any organization in any way associated with Linden (sic) R. LaRouche, Jr.*" (emphasis added; R6a).

After intermittent hearings throughout the spring and summer of 1985,[1] Judge Wood entered a decree nisi upon adjudication on November 12, 1985, and found Lewis to be incompetent within the meaning of the Pennsylvania guardianship statute, 20 Pa. C.S.A. § 5501(1), stating that " . . . by reason of mental illness, (he) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons." (p. 26a, *infra*). In his discussion of the evidence, the trial judge said he was convinced that Lewis had a "personality disorder, at least." (p. 24a, *infra*). At the specific request of the family, Judge Wood then appointed the Wilmington Trust Company as guardian of petitioner's estate. The evidence adduced at these hearings included the testimony of mental health professionals, but a significant portion of the hearings, including that of the professionals, was devoted to an exploration of petitioner's political beliefs and his support of the political philosophy of Mr. LaRouche. Also, there was absolutely no evidence of record that the LaRouche affiliated organizations were anything but bona fide political organizations.

Various family members testified that Lewis had undergone a severe personality change because he had become considerably

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1. These evidentiary hearings were ostensibly held for the purpose of determining whether the preliminary injunction would remain in effect. After these evidentiary hearings were completed on August 30, 1985, Lewis (not believing that the record in any way supported a finding of incompetency) waived his right to a jury trial and agreed that the evidence received on the preliminary injunction could be incorporated as the sum total of the evidence on the adjudication of incompetency in the case-in-chief.

more "serious." His mother testified that he had become secretive and hostile in the beginning of April, but this occurred some days after his sister had told Lewis that the family had covertly planned to file these actions to have him declared incompetent.

The testimony of the mental health professionals was conflicting. Dr. David Halperin, testifying on behalf of the family, claimed that Lewis was suffering from a schizoaffective disorder and as a result was mentally ill. Drs. Gerald Cooke and Robert Sadoff, testifying in behalf of petitioner, directly refuted Dr. Halperin's diagnosis. After their separate and independent examinations of Lewis, they concluded Lewis had a "mixed personality disorder." Dr. Sadoff and Dr. Cooke were uncontradicted in their testimony that a "personality disorder" is not a mental illness. They also independently stated that Lewis duPont Smith did not suffer from a mental illness.

Although Judge Wood accepted the diagnosis of Drs. Cooke and Sadoff and concluded that "Lewis does indeed suffer from a personality disorder" (p. 24a, *infra*), he nonetheless found that Lewis suffered from a "mental illness" within the meaning of the conservatorship statute in disregard of the expert testimony that Lewis's personality disorder was not a mental illness.

In rejecting Lewis's exceptions to the adjudication and decree nisi, Judge Wood discarded petitioner's claim that the court's decision violated his First Amendment rights to freedom of speech and association, stating "[i]t is not that kind of case . . . Lewis's First Amendment freedoms remain intact, and he may exercise them as foolishly as he wishes." *See* p. 18a, *infra*.[2]

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2. Subsequent to his final order, Judge Wood entered two more orders regarding Lewis's applications for the release of funds from his assets. On September 12, 1986, Judge Wood directed the Wilmington Trust Company to

(Cont'd)

On July 21, 1987, the Pennsylvania Superior C
in large part that the trial court had rejected a c
major mental illness found that the evidence wa
establish the undefined "mental illness", essentiall
reasoning of the lower court, and affirmed the orde
petitioner incompetent and appointing a guardia

On January 21, 1988, the Supreme Court of
denied Lewis's petition for allowance of appeal a
exercise its discretionary review of the Superior
(p. 1a, *infra*).

C. How the Federal Question Was Presented

Petitioner, Lewis duPont Smith, has consiste
federal questions sought to be reviewed at ever
proceedings below. In the trial court, the petitic
constitutional issues in closing argument at trial, ir
to the decree nisi, and in trial memoranda both b
of the decree nisi on November 12, 1985, and pri
of the final order on July 23, 1986.[3] Indeed, in
Judge Wood acknowledged petitioner's persistence

(Cont'd)
release $5,635.08 of Lewis's funds for the purchase of a pia
19, 1986, Judge Wood refused to release $1,000 to Lewis
making a political contribution to his cousin's presidentia
duPont for President."

3. Prior to the issuance of the final order, Lewis also
the United States District Court for the Eastern District of
86-3670) to enjoin the state court proceedings before Judge W
that Lewis' constitutional and civil rights had been violatec
rulings. Without ruling on the merits of Lewis' claim that
statute was unconstitutional, the District Court dismissed hi
that defendants were not state actors and/or were not pr
suit. The court also found that abstention would have been

federal questions noting that "[c]ounsel for Lewis has consistently treated this proceeding as one dealing with Lewis' rights to free speech and free association." *See* p. 18a, *infra*. Judge Wood failed to address the constitutional issues however stating summarily that "[i]t is not that kind of case." (p. 18a, *infra*).

Petitioner again raised the federal questions presented here in his brief to the Superior Court of Pennsylvania. The Superior Court also declined to address the constitutional issues raised by petitioner citing as its reason therefor petitioner's lack of notice to the Attorney General of Pennsylvania pursuant to Pa. R.A.P. § 521. *See* pp. 5a-6a, *infra*. Such notice is required under that rule when a party draws in question the constitutionality of any statute in an appellate court in Pennsylvania.

It should be noted that counsel's failure to notify the Attorney General was *not* an oversight. Throughout these proceedings, petitioner has always framed his constitutional arguments in syllogistic form. That is, *if* the lower courts' construction of the guardianship statute is accepted, *then* that construction renders the statute unconstitutional. Petitioner has not directly attacked the constitutionality of the incompetency statute on its face because the courts of Pennsylvania and the rest of the nation have historically construed this and similar statutes so narrowly and restrictively that the statute has heretofore always met constitutional muster.

It is sufficient to note at this point that petitioner has vigorously raised and conscientiously pled the constitutional issues presented here at every level of these proceedings. Indeed, the Supreme Court of Pennsylvania has previously held that when constitutional issues have been otherwise properly pled in the lower courts, it would not decline to hear constitutional arguments merely for the lack of notice to the Attorney General. *Commonwealth ex rel. Stein v. Stein*, 487 Pa. 1 (1979) (Justice Nix). In any event,

petitioner *did* notify the Attorney General of Pennsylvania of his appeal to the Pennsylvania Supreme Court (in which the constitutional issues were again raised). Similarly, the Pennsylvania Attorney General has been served with a copy of the instant petition.

For the purposes of this petition, however, it is essential only that petitioner presented the federal claim and the grounds therefor to the attention of the state courts with fair precision. The decisive consideration for this Court is whether the record as a whole shows either expressly or by clear intendment, that the federal claim was "brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). The Superior Court's refusal to deal with petitioner's federal arguments was a mere evasion of the issues and also was utilized in a manner which unfairly discriminated against the assertion of petitioner's federal claims; thus, this Court's jurisdiction can and should be asserted especially when considering the fundamental importance of the federal questions. *See Rogers v. Alabama,* 192 U.S. 226, 230-231 (1904); *see also, Nickel v. Cole,* 256 U.S. 222, 225 (1921).

REASONS FOR GRANTING THE WRIT

This is a case of first impression. Never before in this country has anyone ever been declared incompetent to manage his or her estate by reason of a mere and common personality disorder. Particularly where the imposition of a guardianship is predicated upon political contributions to promote one's political views and where such a judgment inexorably abrogates that right, this becomes a case of special importance by virtue of the lower court's infringement upon the petitioner's First Amendment rights to free speech, political expression, and political association.

Indeed, the lower court's vague and overbroad construction of the incompetency statute has constitutional implications for us all. What is particularly disconcerting about the trial court's final order which was affirmed by the Superior Court of Pennsylvania is the value-laden dismantling of petitioner's constitutional claims with the glib pronouncement that he may exercise his First Amendment freedoms as "foolishly as he wishes." (*see* p. 18a, *infra*). Not only do the lower courts ignore the immediate and prohibitive impact of the adjudication of incompetency upon petitioner's rights of free speech and expression,[4] but it minimizes the importance of these rights were he able to exercise them.

Finally, the potential chilling effect that the rulings of the lower courts will have on the expression of political beliefs and the exercise of First Amendment rights is a matter of immediate public importance. Accordingly, the trial court's ruling on the constitutional issues and the Superior Court panel's refusal to address these fundamental and important claims beg for review by the Supreme Court of the United States.

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4. For example, petitioner has been denied the right to vote, to enter into valid contracts, to financially support any political organizations or candidates, and his recent marriage is not yet recognized as valid.

I.

THE DECISION OF THE PENNSYLVANIA SUPERIOR COURT WHICH UTILIZES SUCH A BROAD AND LIBERAL CONSTRUCTION OF THE PENNSYLVANIA GUARDIANSHIP STATUTE RAISES FUNDAMENTAL CONCERNS FOR THE EXERCISE OF FREE SPEECH AND POLITICAL EXPRESSION THROUGHOUT THE COUNTRY AND IS THUS A MATTER OF NATIONAL IMPORTANCE.

A. Including Contributions to National Political Organizations Within the Meaning of "Liable to Become the Victim of Designing Persons" Has a Chilling Effect on the Exercise of Free Speech, Political Expression, and Political Association

Without any discussion of petitioner's First Amendment arguments — indeed, in complete disregard of his constitutional rights — the Superior Court affirmed the imposition of a guardianship on petitioner that completely prevents him from spending any money whatsoever to promote his political views and prohibits him from contributing to others whose ideas he supports. In so doing, the Superior Court was required to affirm the finding that a political organization in this country is a "designing person" within the meaning of the conservatorship statute. The national implications that this holding has for the exercise of free speech and political affiliation are obvious and repugnant. Such a construction threatens the free discussion of public issues within the context of political campaigns and indeed, threatens the entire political process. These are First Amendment activities which are integral to the operation of the system of government established by our Constitution. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976). It is a matter that is both far-reaching and nationally significant. In this, an election year, such an invidious characterization of a political organization is both particularly topical and of great public importance.

Not a scintilla of evidence was presented to the trial court that the LaRouche affiliated organizations were "designing persons." Moreover, no court of which we are aware has ever determined that a bona fide political organization, minority or majority, has ever been declared to be a designing person.

Historically, men of wealth have substantially reduced their fortunes in the support of political and/or philosophical causes without being declared incompetent. The reasons for this are obvious. Since political and philosophical organizations typically raise funds from the general population and from loyal followers of wealth to spread their views, such organizations simply cannot fall within the intent of the legislature without running seriously afoul of First Amendment protections. The First Amendment as interpreted by the Supreme Court of the United States includes the fundamental right of free political speech and freedom of association, as well as the right to contribute to those organizations to spread their philosophy. *Id.*, 424 U.S. at 24-25. Any government action which, as in this setting, so completely curtails the freedom to associate is thus subject to the closest scrutiny. *NAACP v. Alabama*, 357 U.S. 449, 460-461 (1958).

In *Buckley*, the Supreme Court agreed that contributions and expenditures of money to promote political ideas are at the very core of political expression and association and are thus protected by the First Amendment. Any limitations imposed on such contributions and expenditures constitute substantial restraints on the quantity and diversity of speech that are both gross and direct. Thus, the Court in *Buckley* held that provisions in the Federal Election Campaign Act limiting the amount which any individual could spend, independently of a candidate but relative to the candidate impermissibly abridged freedom of speech. *Id.*, 424 U.S. at 51. This is precisely the category into which petitioner's contributions and expenditures fall. Particularly relevant to this petition was the Supreme Court's pronouncement that "[t]he First

Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Id.*, 424 U.S. at 57 (1976).

The importance of this case, therefore, does not turn merely on the special facts and circumstances surrounding the egregious violations of this petitioner's freedom of political expression and association; rather, this case derives its significance from the national impact on everyone's freedom to exercise these rights. If a court in any one of a variety of states in this country may declare a person incapacitated by virtue of its ruling that improvident political contributions rise to the level of an inability to make responsible decisions (*see Uniform Probate Code* § 5-103, *see also*, p. 17a, *infra)*, then no one is safe from a declaration of incompetency.

In sum, to hold that a political organization is a designing person under the incompetency statute as the Superior Court has done, is to place a severe chilling effect on the expression of political beliefs through monetary contribution by the followers of those organizations and thus violates First Amendment protections. As such, it is a matter of immediate public importance. Put another way, the Superior Court's affirmance of the adjudication of incompetency in this case sends a very real message to the public, and particularly the electorate: be careful about generous political campaign contributions. If your relatives disapprove of your political philosophies, then they can prevent you from exercising this precious First Amendment right if they can find a quirk in your personality, a psychiatrist who agrees with them, and a judge who believes that the donee is a "political organization with unusual, if not suspect, goals and motives." (*see* p. 23a, *infra*). This case begs for the Supreme Court's authoritative voice to exercise its supervisory powers and protect us all.

B. Including Common Personality Disorders Within the Ambit of "Mental Illness" in the Guardianship Statute Has a Chilling Effect on the Exercise of Free Speech and Political Expression

All fifty states in this nation have guardianship statutes which are similar in varying degrees to the Pennsylvania incompetency statute at issue here. Petitioner could find no case, however, in any of these states where a person has ever been adjudicated incompetent under such a law by reason of a mere and common personality disorder. The lack of precedent in this regard is not surprising for several reasons. First, to include a common personality disorder within the meaning of mental illness, as the Pennsylvania courts have done here, ignores the intent of the legislature and belies basic principles of statutory construction. Second, it would enlarge the class of persons subject to an adjudication of incompetency in a constitutionally impermissible way. Finally, and most importantly, it would allow courts throughout the country to utilize the philosophical views and political beliefs of individuals as the basis for adjudications of incompetency. It is the latter two of these three reasons why the United States Supreme Court should hear this case and prevent the chilling effect on political expression and association that would result from letting such a ruling stand.

The potential for abuse in such an expansive definition of mental illness is nowhere more clearly identifiable than in the decision of the trial court wherein the finding of petitioner's personality disorder/mental illness was based at least in part on the trial judge's evaluation of the process and content of petitioner's political beliefs (*see* p. 22a, *infra*, Finding of Fact #11). Illustratively, the trial court stated " . . . almost every aspect of a person's life has a bearing on whether they're mentally I'll (sic) or not" (R263a). Upon so concluding, the court admitted into evidence several letters penned by petitioner in which he discussed at length his political views. Apparently relying on these

letters as well as petitioner's testimony concerning his beliefs, the trial court inferred that Lewis's personality disorder was in part reflected by his " 'us against them' view of life and society, and a tendency to think in terms of polarization and polemics . . ." (*see* p. 24a, *infra*). Under this definition, might not some of our own leaders who denounce the Soviets as an evil empire be considered mentally ill?

Clearly, if such a definition of mental illness can be utilized to declare someone incompetent, and further, can be accomplished by stating that the peculiarity of one's political philosophy is evidence of that mental illness, then the First Amendment is in deep trouble. More importantly, what impact might an appellate court's imprimatur on such a definition have on the ability of others to feel secure in expressing unpopular political ideas and world views or in contributing to others who "profess to share [that] world view" (p. 24a, *infra*).

The constitutional implications of such a definition of mental illness are especially obvious when one considers that

> [e]pidemiological studies of mental disorder show rates as high as 80% in the population at large and even higher rates in particular age groups within a population. B.P. Dohrenwend & B.S. Dohrenwend, *Social Status and Psychological Disorder: A Causal Inquiry* 9-31 (1969); D. Mechanic, *Mental Health and Social Policy* 65-67, (1969). According to some theoretical views, all human beings are suffering from some form of mental disorder to some extent at all times. L. Kubie, *Practical and Theoretical Aspects of Psychoanalysis* 17-20, (1950).

S. J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. Cal. L. Rev. 527, 550 (1978).

In short, if the lower court ruling is permitted to stand, none of us can feel safe to promote political views that are outside of the mainstream through the expenditure of money. The chilling effect of such a ruling is potentially both widespread and dramatic. The Supreme Court's supervisory powers are required now to arrest this abridgement of our precious First Amendment rights.

The national impact of such a definition of mental is also underscored when it is recognized that the Uniform Probate Code (UPC) has been adopted by eighteen states. *See* Uniform Probate Code, U.L.A. (Directory of Uniform Acts and Codes; Tables-Index), 1988 (pamphlet).[5] The UPC, like the Pennsylvania Guardianship Act, fails to define the term mental illness but does provide for the guardianship of the estate of incapacitated persons (*see* UPC, § 5-101, *et seq.*) and defines incapacitated persons as follows:

> Incapacitated Person. Any person who is impaired by reason of *mental illness*, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

Id., § 5-103 (emphasis added).

Clearly, if personality disorders are included within the

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5. Alabama also adopted the Uniform Probate Code on January 1, 1988. 26 Ala. Code § 26-2A-1 et seq.

meaning of mental illness in the Pennsylvania courts, then they can likewise serve as a basis for incapacitation in the courts of states that have adopted the UPC since mental illness is nowhere defined in either statute and the parameters of incompetence are equally arbitrary. That is, if the decision of the lower court is permitted to stand it would serve as a direct precedential guide to the UPC states, particularly if certiorari is denied in this case. Such a precedent can thus be seen as the first step towards a constitutional crisis in this nation. This Court should hear this case to prevent such an assault on the Constitution by providing guidance to the courts of all the states in this country as to the appropriate constitutional limitations that must attach to the construction of such statutes and particularly to the term mental illness.

II.

THE SUPERIOR COURT'S CONSTRUCTION OF THE GUARDIANSHIP STATUTE IN THIS CASE RENDERS THE STATUTE VOID FOR VAGUENESS AND IMPERMISSIBLY OVERBROAD AND VIOLATES THE DUE PROCESS PROTECTION AFFORDED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The foregoing discussion which highlighted the national impact of the lower courts' decision on the exercise of precious fundamental First Amendment rights is directly and symbiotically related to the fundamental due process concerns that are raised by the lower courts' construction of the Pennsylvania guardianship statute.

A. Vagueness

It is well settled that statutes must be drawn with sufficient

specificity to provide fair warning of the conduct proscribed by the law and to limit the discretion of governmental authorities or courts in enforcing the law. *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972). This is true especially where the exaction of obedience to a rule or standard is so vague and indefinite as to really be no rule at all, and where instead it strips the participant of his rights.

Because the fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment [*Cantwell v. Connecticut,* 310 U.S. 296, 302 (1939)], vague state laws which infringe on First Amendment rights are to be examined even more closely and with strict scrutiny. *Ashton v. Kentucky,* 384 U.S. 195, (1966). Applying the principles enunciated above to the Pennsylvania guardianship statute and the lower courts' construction thereof, one can readily see that the standard in the law is impermissibly vague. How mentally ill must a person be before a conservatorship is required? What is meant by the term "mental illness"? How "unable to manage" his or her property must a person be? What does "liable to dissipate" mean? What is meant by "liable to . . . become the victim of designing persons"? Nothing in the statute prevents arbitrary enforcement and the result is unconstitutional vagueness.

The lower courts' construction of the statute which allows a mere personality disorder to fall within the undefined term "mental illness", and allows Lewis' financial support of LaRouche's political philosophy to be read as equivalent to "victim of designing persons", demonstrates that the statute is void for vagueness. Neither of the lower courts were able to define the term mental illness, but yet considered a personality disorder to be within its ambit. If that view were to prevail, the Supreme Court's direction that "[t] he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise" would be meaningless.

See Buckley v. Valeo, 424 U.S. at 57. It is a rare psychiatrist indeed that would not characterize such a person who makes improvident political contributions that "beggar himself and his family" [*Matter of Caine,* 490 Pa. 24, 415 A.2d 13 (1980)] as having a personality disorder.

The statute is so imprecise in terms of who it includes within the definition of mental illness that persons of common intelligence must necessarily guess at its meaning and may differ as to its application.[6] Thus, the chilling effect on the exercise of First Amendment rights is clear and evident. That is, where a vague statute abuts upon sensitive areas of basic First Amendment rights, it operates to inhibit the exercise of those rights and the uncertain meanings contained in those laws inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were clearly marked." *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1975). As petitioner's above arguments clearly show, the guardianship statute is a law that is fraught with uncertain meanings and is subject to arbitrary enforcement. When this enforcement occurs in the realm of financial support of political ideas, the statute cannot pass constitutional muster.

B. Overbreadth

If the lower courts' construction of the statute is valid then

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6. It is particularly appropriate here to note that, since the hearings in this matter, the "mixed personality disorder" found by the trial court has been eliminated and redefined by the Diagnostic and Statistical Manual. *See* Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, Washington, D.C.: APA, 1987, p. 358. Thus, it seems that the term "mental illness" as written by the legislature is subject to constant redefinition by a committee of the American Psychiatric Association. Must citizens now guess at what the next revision might bring in order to steer clear of the proscriptions contained in the statute?

the statute is unconstitutional by reason of its overbreadth. A classic definition of overbreadth declares that a statute is void if, in addition to proscribing speech or conduct that may be constitutionally prohibited, it also brings within its terms speech or conduct which is protected by the First Amendment clauses of freedom of speech and association. *Thornhill v. Alabama,* 310 U.S. 88 (1940).

If the Superior Court is correct that the statute can be stretched to prohibit major financial support of political ideas, then no citizen can feel safe in supporting organizations which, in the words of the trial court, "profess to share his world views." (p. 24a, *infra*).

It is particularly interesting that only recently Mrs. Joan B. Kroc, widow of the McDonald's fast food magnate, contributed one million dollars to the Democratic party for the upcoming presidential campaign. What chilling effect might the Superior Court's ruling have had upon Mrs. Kroc, had she known that she could be declared mentally incompetent for making such an extravagant contribution? Further, what implications might this have for our entire political process?

Justice Marshall described an overbroad statute as one that hangs over peoples' heads like a sword of Damocles. That this Court will ultimately vindicate a person if his speech is determined to be constitutionally protected is of little consequence because the value of a sword of Damocles is that it hangs, not that it drops. *Arnett v. Kennedy,* 416 U.S. 124 (1974) (Marshall J., dissenting).

The focus of the overbreadth doctrine is not necessarily on the individual before the court but on others who may forego protected activity rather than run afoul of the statute's proscription. Again, the Superior Court's ruling, when viewed

in this manner requires the Supreme Court to take a c
in review so as to protect the First Amendment right
the citizens of this democratic nation.

When overbreadth is apparent from the statute,
can be saved if the interpreting courts can clearly ca
constitutional from the unconstitutional applicatio
however, this statute is definitively construed by Pe
appellate courts to limit "mental illness" to those traditi
psychoses characterized by the individual's mental b
reality, and "designing persons" limited to the tradi
artist, and specifically excluding political, religious or ph
ideas and organizations from its scope, then no citiz
free to fully exercise his or her fundamental First A
freedoms.

The problems of selective application and inher
the fact finders is best demonstrated again by the t
own words. During the examination of Lewis con
philosophical beliefs, the court, at sidebar, remarke
know if I am going to sit here and hear about platonic
I want to hear something that is really going to stone
you can probably dig up a dozen or two people in the
who think in that fashion and they wouldn't all be in
(R219a) and by contrast, stated that Lewis was simply
away his money on the La Rouche (sic) organizatio

If the lower courts' construction of the statut
to stand, the "chilling effect" on citizens' rights
minority political or philosophical positions is eno

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES B. CRUMMETT
Counsel of Record
JAMES B. CRUMMETT
& ASSOCIATES, P.C.
Attorneys for Petitioner

JAMES B. CRUMMETT
JOHN S. McVEIGH
On the Petition

APPENDIX A — SUPREME COURT OF PENNSYLVANIA'S DENIAL OF PETITION FOR ALLOWANCE OF APPEAL

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

January 22, 1988

James B. Crummett, Esquire
JAMES B. CRUMMET & ASSOCIATES, P.C.
Suite 1120
325 Chestnut Street
Philadelphia, Pa. 19106

RE: Lewis duPont Smith v. E. Newbold Smith, Margaret DuPont Smith, Stockton N. Smith, Eleuthera S. Grassi and Henry B. duPont Smith
No. 655 E.D. Allocatur Docket 1987

Dear Mr. Crummett:

This is to advise you that the following Order has been endorsed on your Petition for Allowance of Appeal, filed in the above captioned matter:

"January 21, 1988.

Petition Denied.

Per Curiam".

Appendix A

Very truly yours,

s/ Patrick Tassos
PATRICK TASSOS
Deputy Prothonotary

/ma
cc: Leroy Zimmerman, Esquire
Leroy Dubin, Esquire

RECEIVED JAN. 25, 1988

APPENDIX B — JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02270 Philadelphia, 1986

E. NEWBOLD SMITH, MARGARET DUPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI AND HENRY B. DUPONT SMITH

v.

LEWIS DUPONT SMITH,

Appellant

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Chester County be, and the same is hereby affirmed.

By the Court:

s/ David A. Szewczak
Prothonotary

Dated: July 21, 1987

APPENDIX C — OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02270 Philadelphia, 1986

E. NEWBOLD SMITH, MARGARET DUPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI AND HENRY B. DUPONT SMITH

v.

LEWIS DUPONT SMITH,

Appellant

Appeal from the Order Entered on July 23, 1986, in the Court of Common Pleas of Chester County, Orphans' Court Division, No. 1985- 0412.

Filed July 21, 1987

BEFORE: *CIRILLO, P.J., BECK and HESTER, JJ.

OPINION BY HESTER, J.:

This is an appeal by an adjudicated incompetent from a final order. The trial court found appellant to be incompetent due to mental illness, making him liable to dissipate his assets and become the victim of designing persons. The trial court appointed a financial institution as guardian of appellant's estate. We affirm.

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* President Judge Cirillo replaced the deceased Justice Roberts.

Appendix C

On April 11, 1985, appellees, who are parents and siblings of appellant, filed an ex parte petition for a preliminary injunction in the Orphans' Court Division of the Chester County Court of Common Pleas, requesting that appellant be restrained from transferring any of his substantial assets to organizations affiliated with Lyndon LaRouche. At the same time, appellees filed a petition requesting an adjudication of incompetency and the appointment of a guardian of the estate of the incompetent.

On November 12, 1985, following several evidentiary hearings, the trial court found that appellant, by reason of mental illness, was unable to manage his property or was liable to dissipate it or become the victim of designing persons. The trial court issued an adjudication and decree nisi finding appellant incompetent which became a final order on July 23, 1986, after the denial of appellant's exceptions.

Appellant raises six issues in this appeal: 1) whether appellees met their burden of proving by clear and convincing evidence that appellant suffered from a mental illness; 2) whether the trial court erred by labeling a "personality disorder" as a mental illness; 3) whether appellees met their burden of proving by clear and convincing evidence that appellant was liable to dissipate his property or become the victim of designing persons; 4) whether the trial court erred by including the support of a political philosophy or organization within the ambit of the phrase "become the victim of designing persons"; 5) whether the competency statute is constitutional as applied to appellant; and 6) whether the competency statute is constitutional on its face.

Appellant's constitutional issues must be considered, first. We decline to address these issues as appellant did not give notice to the Attorney General of Pennsylvania as required by Pa.R.A.P.

521.[1] *Faust v. Messinger,* 345 Pa. Super. 155, 497 A.2d 1351 (1985).

Our scope of review in determining whether an individual should be adjudicated incompetent and have a guardian of his estate appointed is well established. The trial court has the sound discretion to determine whether the appointment of a guardian is necessary and this court will not reverse absent an abuse of that discretion. *In Re Earnshaw,* 187 Pa. Super. 124, 144 A.2d 480 (1958). "We do not substitute our judgment for that of the court below; even though we, had we been sitting in judgment below, might have reached a contrary result." *Matter of Caine,* 490 Pa. 24, 29, 415 A.2d 13, 16 (1980) *quoting Myers Estate,* 395 Pa. 459, 462, 150 A.2d 525, 526 (1959).

A guardianship can be imposed if it is established that a person is, under 20 Pa.C.S. § 5501, "unable to manage his property,

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1. Rule 521. Notice to Attorney General of Challenge to Constitutionality of Statute

(a) Notice. It shall be the duty of a party who draws in question the constitutionality of any statute in any matter in an appellate court to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question; together with a copy of the pleadings or other portion of the record raising the issue, and to file proof of service of such notice.

(b) Status of Attorney General. The Attorney General may be heard on the question of the constitutionality of the statute involved without formal intervention. If the Attorney General files a brief concerning the question the Commonwealth shall thereafter be deemed to be an intervening party in the matter.

or is liable to dissipate it or become the victim of designing persons."[2] Additionally, it must be established that this "inability to manage one's property results from 'infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety.' " *Matter of Caine, supra,* 490 Pa. at 28, 415 A.2d at 15 *quoting Porter Estate,* 463 Pa. 411, 415, 345 A.2d 171, 173 (1975). Finally, appellant's incompetence must be established by clear and convincing proof. *Matter of Caine, supra,* at 28, 415 A.2d at 15.

Appellant argues that appellees failed to prove by clear and convincing evidence that he was suffering from a mental illness. The trial court found that appellant's personality began to change in early 1985; from "happy-go-lucky" to serious, withdrawn and hostile to his family. Trial court opinion, 11/12/85, at 1. Simultaneously, appellant became increasingly involved with the Lyndon LaRouche organization.[3] Appellant loaned Caucus Distributions, Inc., an affiliate of the LaRouche organization,

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2. § 5501. Meaning of incompetent

"Incompetent" means a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety:

(1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; or

(2) lacks sufficient capacity to make or communicate responsible decisions concerning his person.

3. Appellant suffered nightmares and became extremely withdrawn, "up tight" and nervous. He also began to espouse LaRouche philosophy even though he could not explain it. Reproduced record (hereinafter "R.") at 402a-04a.

$212,000 within two months.[4] This loan was evidenced by an unsecured promissory note for $142,000. Appellant testified that he would not be upset if the loan were not repaid and he was not certain that it would be. R. at 170a. Trial court opinion, 11/12/85, at 2.

Additionally, the trial court found that during the three years prior to this action, appellant incurred substantial losses as the result of ill-advised business investments.[5] Appellees' expert witness, a psychiatrist, who met with appellant and examined several of his writings, concluded that appellant was suffering from a schizoaffective disorder and was likely to become the victim of designing persons.[6] *Id.* at 2.

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4. Appellant's transfers to CDI:

February 13, 1985	$ 6.000.00
February 21, 1985	6.000.00
March 5, 1985	25,000.00
March 8, 1985	5,000.00
March 20, 1985	100,000.00
April 2, 1985	20,000.00
April 4, 1985	50,000.00
	$212,000.00

R. at 118a-24a.

5. Appellant invested $80,000 in the American Walnut Corporation in 1981 and lost the entire amount. R. at 174a. Appellant lost over $23,000 in silver bullion in May, 1981. R. at 175a, 223a. Over a two month period in March, 1984, appellant lost roughly $52,000 in various stocks. R. at 178a-79a.

6. Appellant suffers from a schizophrenic affective disorder which renders him unable to appreciate reality as to relate to it in any way other than in an "inappropriate and disfunctional fashion." R. at 453a-7-453a-8. Appellant

(Cont'd)

Appendix C

Moreover, appellant's expert witnesses, a psychiatrist and a psychologist, testified that appellant was suffering from a mixed personality disorder with inadequate and immature features.[7] R. at 640a-41a, 807a. Upon examination of appellant's letters and testimony, the trial court determined appellant has a "disorganized mind and compensates by setting up an oversimplified view of the world in which he is one of the good guys and 'they' are conspirators bent on mischief. As such, he would be and has been an easy target for anyone who pretends to support him in his efforts to combat the bad guys." Trial court opinion, 11/12/85, at 3.

The trial court was clearly convinced that appellant was "suffering from a 'mental illness' as that term is used in the legislation, so that he no longer has the ability to 'choose' in either a knowledgeable or totally voluntary way." *Id.* at 7. Although the trial court heard conflicting evidence concerning appellant's mental condition, it found appellant "not equipped to deal with his financial affairs in even a minimal way, due to the disorganized and unrealistic way he views finances and world events. He is a target for designing persons and is liable to dissipate his assets, and requires protection of the Court." *Id.* Upon thorough review of the record, we hold that the trial court acted within its sound discretion in finding that appellees proved appellant's mental illness by clear and convincing evidence.

(Cont'd)
suffers "delusions of persecution" and manifests symptoms of a "paranoid individual." R. at 453a-10-453a-15. Because of this mental illness, appellant cannot objectively judge those who say that they share his common ideology thus making it very easy for appellant to get swept up in his colleagues ideas that are of a financial nature. R. at 453a-16.

7. Neither of appellant's expert witnesses believed that appellant suffered from a mental illness. R. at 642a, 807a.

Appendix C

Appellant's next argument is that the trial court erred in labeling a personality disorder a mental illness. This argument ignores the trial court's finding that appellant is mentally ill as set forth in 20 Pa.C.S. § 5501. Trial court opinion, 11/12/85, at 7. Furthermore, this court has held:

> We are not unduly troubled by the question of semantics. The purpose of the Incompetents' Estates Act is preventative [sic] and protective in nature. Card's Appeal, 177 Pa. Super. 502, 110 A.2d 856. The following language of President Judge Baldridge in Refior's Case, 160 Pa. Super. 305, 50 A.2d 523, 527, is particularly appropriate: "Whether an alleged incompetent is found to be mentally 'confused,' 'defective,' 'feeble,' or 'weak' is not vitally important. If, as here, it appears that one's mind is so affected that as a consequence thereof he is liable to dissipate or lose his property and become the victim of designing persons, the court, if other requirements are met, may appoint [or refuse to remove] a guardian".

In Re Earnshaw, supra, 187 Pa. Super at 129, 144 A.2d at 482- 83.

The trial court properly found appellant's mind to be so affected that he was "suffering from a significant impairment in his ability to cope," thus making him liable to dissipate his assets and become the victim of designing persons. Trial court opinion, 11/12/85, at 7.

Appellant further argues that appellees did not meet their burden of proving by clear and convincing evidence that appellant was liable to dissipate his property or become the victim of

designing persons. The trial court recognized that "a man may do what he pleases with his personal estate during his life. He may beggar himself and his family if he chooses to commit such an act of folly." *Bryden Estate,* 211 Pa. 633, 636, 61 A. 250, 251 (1905). Trial court opinion, 11/12/85, at 6. However, the court found by clear and convincing evidence that appellant was not able to choose in a voluntary or knowledgeable manner, and in the event he dissipated his assets, he would not be doing so freely or voluntarily. Following an exhaustive review of the record, we agree.

Finally, appellant argues that the trial court erred by including the support of a political philosophy or organization within the ambit of the phrase "become the victim" of designing persons." The trial court stated:

> It seems to us that the legislation is designed to protect one who has been peculiarly disabled by his or her mental makeup from resisting the exploitation of others. The evidence indicates that the exploitation has already begun, and that Lewis, because of his particular mental makeup, has succumbed to the blandishments of the LaRoach [sic] organization. The evidence further indicates that unless the Court intervenes, Lewis will continue to squander his admittedly substantial resources.

Id. We agree with the trial court that appellant's mental illness has resulted in producing a condition that has made him a victim of the LaRouche organization.

We affirm the order of the trial court adjudicating appellant

incompetent and appointing a financial institution as guardian.

BECK, J., filed a Concurring Opinion.

APPENDIX D — CONCURRING OPINION BY BECK, J.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 02270 Philadelphia, 1986

E. NEWBOLD SMITH, MARGARET DUPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI AND HENRY B. DUPONT SMITH

v.

LEWIS DUPONT SMITH,

Appellant

Appeal from the Order Entered on July 23, 1986, in the Court of Common Pleas of Chester County, Orphans' Court Division, No. 1985- 0412.

BEFORE: BECK, HESTER AND ROBERTS, JJ.

CONCURRING OPINION BY BECK, J.:

I join the opinion of the majority. I write separately in order to emphasize that a finding of incompetency under the Decedents, Estates, and Fiduciaries Code must be based upon a searching inquiry into the facts of the particular case before the court.

As the Pennsylvania Supreme Court has noted, a law "which empowers a court to declare an individual mentally incompetent and to place such individual's business affairs in the hands of another is 'a dangerous statute easily capable of abuse . . .' " *Myers Estate,* 395 Pa. 459, 462, 150 A.2d 525, 526 (1959) (citing *Denner v. Beyer,* 352 Pa. 386, 388, 42 A.2d 747, ____ (1945)). *See generally* Comment, *Guardianship Incompetency Standard,*

124 U. Pa. L. Rev. 1045 (1976). This danger of abuse is especially great where the alleged incompetent has given large sums of money to an organization which espouses a political ideology that is outside the mainstream. However, in the case *sub judice,* I find upon careful reflection sufficient evidence of record from which the trial court would have fairly concluded that appellant's incompetency was established and that the donations or loans he made to the LaRouche organization were manifestations of that incompetency. If appellant had given or lent money to the Republican or Democratic parties or to a recognized charity under the same circumstances as existed in this case, I would also have concluded that the trial court did not err in finding him incompetent. I therefore conclude that the incompetency statute was not applied in a discriminatory manner and that the trial court's order should be affirmed.

Appellant's own testimony reveals a certain confusion and apathy regardinq his financial affairs. For example, at a hearing on April 16, 1985, he was unable to explain why he had transferred $50,000 to a group affiliated with Lyndon LaRouche on April 4, 1985, and he did not remember whether this transfer represented a gift or a loan. N.T. April 16, 1985 at 48-50. Appellant also had difficulty adding figures and he was unable to count backward by threes.[1] Appellee's expert witness diagnosed appellant as suffering in part from an organic mental disorder which impaired

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1. A. Backwards from a hundred by threes?

Q. By threes.

A. By threes. *Ninety-seven, 94, 80 — 87. Eighty-three, 79, 60 — uhm, 69, 50* — how much longer do you want me to go?

(Cont'd)

his ability to calculate. N.T. June 12, 1985 at 37; July 29, 1985 at 51-54.

The record also supports the inference that appellant has already become the victim of designing persons. Appellant's former roommate testified that during the fall of 1984, a representative of LaRouche often telephoned appellant two or three times a night to solicit money. N.T. June 12, 1985 at 5-6. At this time, appellant refused to make a donation; however, he became deeply involved in the LaRouche orqanization in early 1985 after attending a series of lectures sponsored by the group. During this period, appellant told his brother that he was sleeping only two or three hours per night. N.T. June 11, 1985 at 83.

Between February 13, 1985 and April 4, 1985, appellant donated or loaned a total of $212,000 to the LaRouche organization. Although appellant assured his family that he would not give the organization any more money until he received his first interest payments on his loans, he changed his mind after visiting the group's headquarters in Leesburg, Virginia. N.T. April 20, 1985 at 13; June 11, 1985 at 199. On April 10, 1985, he attempted to wire an additional $75,000 to a LaRouche affiliate. It was at this point that his family filed a petition for the appointment of a guardian.

On June 11, 1985, appellant informed the trial court that he planned to move to Leesburg in order to work for the

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(Cont'd)

Q. All the way.

A. Be here a long time.

N.T. June 11, 1985 at 12.

organization in return for what he described as a "nominal stipend." N.T. June 11, 1985 at 69. He also said that he was not interested in finding out how much he would be paid prior to relocating. *Id. at 71.* Later that month, he was told by his father's secretary that his mother had become severely depressed as a result of his actions; he reportedly responded, "[W]ell, someone had to be sacrificed for the cause and it might as well be her." N.T. August 30, 1985 at 44. Furthermore, in January 1986, six months before the trial court issued its final order, appellant was convicted in federal court of assaulting in an airport an individual who had questioned LaRouche's policies.

Finally, it is significant that even one of appellant's own expert witnesses testified that appellant has a "mental disorder" and that "he's more likely to be influenced, conned, if you will, than the average individual." N.T. July 9, 1985 at 75-76.

In light of all the circumstances of this case, the trial court did not abuse its discretion by concluding that there is clear and convincing evidence that appellant suffers from a serious mental disturbance, that he is likely to dissipate his estate, and that he is not capable of making a knowing and voluntary decision to dissipate his estate because of his mental condition. Accordingly, I agree that the trial court acted properly when it appointed a guardian to manage appellant's assets.

APPENDIX E — FINAL ORDER OF THE COURT OF COMMON PLEAS, WOOD, J.

IN THE COURT OF COMMON PLEAS
OF CHESTER COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

E. NEWBOLD SMITH, et al

vs.

LEWIS duPONT SMITH
NO. 1985-0412

MEMORANDUM ORDER

AND NOW, this 23d day of July, 1986, after argument and upon review of the record and briefs, Respondent's Exceptions to our Adjudication and Decree Nisi of November 12, 1985 are dismissed. I direct that the Decree Nisi be entered as the final Order of this Court.

With respect to Respondent's Exceptions to certain of my factual findings, I will stand on the record, which, in my opinion supports those findings.

The major legal dispute in this case was one of definition. The question was whether Respondent's particular mental problem amounted to a "mental illness" as that term is used in 20 Pa. C.S.A. § 5501(1). I concluded that it did because it has made Respondent unable to protect himself or his estate from designing persons or from dissipating his assets. Respondent, in my judgment, has not made a knowing and voluntary choice to throw away his money on the La Rouche organizations. Instead, his mental disorder has made him unable to resist their blandishments.

Appendix E

Whether or not certain personality disorders are mental illnesses is a question on which those trained in the field are not in agreement. In other contexts, the distinction between one suffering from a personality disorder and one who displays a traditional mental illness has been called "too subtle to be traced definitively by the judicial mind": *State, ex rel R.S. v. Trent,* ____ W. Va. ____, 289 S.E. 2d 166, 172 (1982); see also *Johnson v. Noot,* ____ Minn. ____, 323 N.W. 2d 724 (1982). As a judge, I must be primarily concerned with behavior and its consequences. In interpreting the guardianship statutes, I must consider "the mischief to be remedied": 1 Pa. C.S.A. § 1921(c)(3).

Following argument in this matter, counsel for Respondent called to our attention a California case, *Katz v. Superior Court of California,* 73 Cal. App. 3d 952 (1977). We find that case distinguishable in two major respects: First, it dealt with the appointment of a guardian of the person, and second, it dealt with a situation where petitioners were attempting to restrain the liberty of the alleged incompetents for the purpose of deprogramming. Here, I did not restrain Lewis Smith's liberty, nor have I limited his right to speak, believe, or associate with others. I have only limited his use of his money to the extent necessary to prevent him from dissipating his assets to any substantial degree. Counsel for Lewis has consistently treated this proceeding as one dealing with Lewis's rights to free speech and free association. It is not that kind of case. Like almost every other proceeding under 20 P.C.S.A., Chapter 55, that comes before me, all I have to decide, and all I did decide, was whether Lewis, because of a mental illness, was likely to become the victim of designing persons, so that I should enter an Order protecting his estate. Lewis's First Amendment freedoms remain intact, and he may exercise them as foolishly as he wishes.

Appendix E

The Petition of Wilmington Trust Company for approval to commence legal action is granted: See 20 Pa. C.S.A. § 5521; Pa. R.C.P. 2053.

BY THE COURT:

s/ J. Wood
J.

FROM THE RECORD
ATTEST: Kathryn Howard
Ass't Clerk of the Orphans Court
Division of the Court of Common Pleas
of Chester County, Pa.
July 24, 1986

APPENDIX F — DECREE NISI OF THE COURT OF COMMON PLEAS, WOOD, J.

IN THE COURT OF COMMON PLEAS
OF CHESTER COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

E. NEWBOLD SMITH, et al

v.

LEWIS duPONT SMITH

NO. 1985-0412

ADJUDICATION

The parents, brothers and sisters of Lewis duPont Smith have petitioned this Court to adjudge him an incompetent and to appoint a guardian of his estate. After numerous hearings and after closing arguments by both counsel, we make the following

FINDINGS OF FACT

1. Respondent Lewis duPont Smith is a 28 year old unmarried male who resides at 7003 Goshen Road, Newtown Square, Chester County, Pennsylvania.

2. Respondent's estate contains at least One Million Five Hundred Thousand Dollars ($1,500,000) in cash and marketable securities.

3. Petitioners are Lewis's parents, brothers and sisters. They presented testimony which established that Respondent's

personality started to change about the beginning of 1985. He went from being a friendly, "happy go lucky" sort to being a serious and withdrawn person hostile to his family.

4. The timing of the personality change coincided with Lewis's increased involvement with a political organization headed by one Lyndon LaRoach.

5. Respondent thereafter became deeply involved with the LaRoach organization and lent Caucus Distributors, Inc., an arm of LaRoach, $212,000 within a period of less than two months.

6. The only evidence of this loan was an unsecured promissory note for $142,000. Lewis was also prepared to wire an additional $75,000 when this action was commenced and we enjoined the transfer.

7. Lewis testified that it would not upset him if the loan wasn't paid back and that he wasn't certain that it would be.

8. During the three years prior to the commencement of this action, Lewis made sundry other ill-advised business investments and incurred substantial losses as a result.

9. Psychiatrist David Halperin, M.D., who had met with a the family and with Lewis in New York and examined various writings of Lewis's, concluded that he was suffering from a schizoaffective disorder and, as a result, was liable to become the victim of designing persons.

10. Lewis's medical experts, Dr. Gerald Cooke, a psychologist, and Dr. Robert Sadoff, a psychiatrist, both testified that he was suffering from a mixed personality disorder with

inadequate and immature features.

11. Our own evaluation of Lewis from examining the various letters which he wrote and from observing his testimony is that he has a disorganized mind and compensates by setting up an oversimplified view of the world in which he is one of the good guys and "they" are conspirators bent on mischief. As such he would be and has been an easy target for anyone who pretends to support him in his efforts to combat the bad guys.

12. Originally Lewis resisted the LaRoach organization's requests for money and he even became a little angered by them and said that he would not give any money. He wound up doing the opposite.

DISCUSSION

Section 5501(1) of the Probate, Estates and Fiduciaries Code defines an "incompetent" as

> a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety:
>
> (1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons . . . .

20 Pa. C.S.A. § 5501(1).

We are required here to decide whether or not Lewis Smith is likely to dissipate his estate or become the victim of designing persons because of a "mental illness". We may summarize the evidence as indicating that Lewis has some sort of mental disorder,

and that he has in the past not only made unwise investments, but most recently has practically given money away to a political organization with unusual, if not suspect, goals and motives. In analyzing whether the statute intends us under these circumstances to appoint a guardian of Lewis' estate, we must look first to the medical meaning (if any) of the term "mental illness"; thence to the intent of the legislature; and thence to the evidence in this particular case.

Two psychiatrists and a psychologist testified in this case. The family's psychiatrist described Lewis as having a mental illness, while his own psychiatrist and psychologist simply ascribed a mental disorder to him. All three experts referred to a work published by the Psychiatric Association, the Diagnostic and Statistical Manual (DSM-III), in defining the terms which which they used. That manual itself does not distinguish between mental illnesses or personality disorders. Rather, it talks simply in terms of mental or personality disorders, as follows:

> Personality traits are enduring patterns of perceiving, relating to, and thinking about the environment and oneself, and are exhibited in a wide range of important social and personal contexts. It is only when personality traits are inflexible and maladaptive and cause either significant impairment in social or occupational functioning or subjective distress that they constitute Personality Disorders.

A "personality disorder", then, is a way of thinking or acting which constitutes a substantial departure from the norm, and interferes with the ability of one to cope with life in a normal or realistic way.

Appendix F

All three experts appear to agree that Lewis is suffering from a personality disorder, *at least*. The evidence itself shows the following: a history of being unable to deal successfully with financial affairs; difficulty in dealing with numbers; difficulty in organizing his life and in holding a job; difficulty in presenting his thoughts to others in a logical and rational way; an "us against them" view of life and society, and a tendency to think in terms of polarization and polemics; and difficulty in resisting the importunings of persons who profess to share his world view. We conclude that Lewis does indeed suffer from a personality disorder, of sufficient severity that it has significantly impaired his ability to manage his personal and financial affairs in a way approoriate to his own interests.

It has been suggested that Lewis' generous impulses differ only in subject matter from those impulses which lead deeply religious persons to support generously the religion of their choice or to give to the poor. There is a difference, however, even though (like pornography) it may be difficult to define. We are reluctant to equate the importunings of the Lyndon LaRoach organization with the message of Christianity or of any of the other recognized religions.

Is this the sort of thing which the legislation regarding the appointment of guardians was intended to guard against? We conclude that it is. It seems to us that the legislation is designed to protect one who has been peculiarly disabled by his or her mental makeup from resisting the exploitation of others. The evidence indicates that the exploitation has already begun, and that Lewis, because of his particular mental makeup, has succumbed to the blandishments of the LaRoach organization. The evidence further indicates that unless the Court intervenes,

Lewis will continue to squander his admittedly substantial resources.

We acknowledge that under normal circumstances, "[A] man may do what he pleases with his personal estate during his life. He may beggar himself and his family if he *chooses* to commit such an act of folly.": *Bryden Estate,* 211 Pa. 633, 636, 61 A.2d 250, 251 (1905) (emphasis added). Because of the serious intrusion on a person's right to manage his or her property, the proof of mental incompetency must be clear and convincing: *Myers Estate,* 395 Pa. 459, 150 A.2d 525 (1959), *Porter Estate,* 463 Pa. 411, 345 A.2d 171 (1975), *Matter of Caine,* 490 Pa. 24, 415 A.2d 13 (1980). For the reasons stated above, we are clearly convinced that Lewis is suffering from a "mental illness" as that term is used in the legislation, so that he no longer has the ability to "choose" in either a knowledgeable or totally voluntary way. All three experts who testified confirmed that he was suffering from a significant impairment in his ability to cope. We are also persuaded by the nature and character of Lewis's own testimony: *Myers, supra,* at 417. "One's mental capacity is best determined by his spoken words, his acts and conduct": *Ryman's Case,* 139 Pa. Super. 212, 218, 11 A.2d 677 (1940). Our observations of his testimony and his writings convince us that he is not equipped to deal with his financial affairs in even a minimal way, due to the disorganized and unrealistic way he views finances and world events. He is a target for designing persons and is liable to dissipate his assets, and requires the protection of the Court.

We will direct, however, that a financial institution and not an individual be appointed guardian.

Appendix F

CONCLUSIONS OF LAW

1. The Orphans' Court Division has jurisdiction over this matter.

2. Respondent, by reason of mental illness, is unable to manage his property; or is liable to dissipate it or become the victim of designing persons.

DECREE NISI

AND NOW, this 12th day of November, 1985, after hearing, we find Lewis duPont Smith to be incompetent within the meaning of 20 Pa. C.S.A. § 5501 and direct Petitioners to recommend to the Court a financial institution of their choice to serve as guardian of Respondent's estate.

This DECREE NISI shall become the final order of the Court unless exceptions are filed within ten (10) days of this date.

BY THE COURT:

s/ J. Wood
J.

FROM THE RECORD
ATTEST: Doris M. Skeles
1st Asst. Clerk of Orphans' Court
Division of the Court of Common Pleas
of Chester County, Pa.
November 13, 1985

Supreme Court, U.S.
FILED
MAY 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1753

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

LEWIS duPONT SMITH,

Petitioner,

v.

E. NEWBOLD SMITH, MARGARET duPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI, and HENRY B. duPONT SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does this Court possess jurisdiction under 28 U.S.C. §1257 to review by certiorari a judgment predicated on a state statute whose constitutionality is challenged in this Court, where petitioner failed to notify the Attorney General of Pennsylvania of the constitutional challenge as required by state procedural rule and where, for this reason and following its settled practice, the Superior Court of Pennsylvania, the highest state appellate court that reviewed the judgment, declined to rule on the constitutional questions?

2. Is Section 5501(1) of Pennsylvania's Guardianship Act, which authorizes the appointment of a guardian for any "incompetent" person — defined as one "who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety . . . is unable to manage his property, or is liable to dissipate it or become the victim of designing persons" — on its face or as applied violative of the First Amendment's guarantee of freedom of speech and right of association, as vague or substantially overbroad?

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No. 87-1753

IN THE

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October Term, 1987

LEWIS duPONT SMITH,

Petitioner,

v.

E. NEWBOLD SMITH, MARGARET duPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI, and HENRY B. duPONT SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

A. Proceedings in the Trial Court.

Respondents, the parents, sister, and brothers of petitioner, Lewis duPont Smith ("Lewis"), brought this incompetency proceeding under the Pennsylvania Guardianship Act ("the Act"), 20 Pa. C.S.A. §5501, on April 11, 1985, in the Orphan's Court Division of the

Court of Common Pleas of Chester County, Pennsylvania, seeking a declaration that petitioner is "incompetent" within the meaning of the Act; that is, that he is "a person who, because of . . . mental illness, mental deficiency or retardation . . . is unable to manage his property or is liable to dissipate it or become the victim of designing persons." 20 Pa. C.S.A. §5501(1).[1]

On the same day, the Court of Common Pleas, per the Honorable Lawrence E. Wood, entered a preliminary injunction enjoining Mellon Bank East and Lewis duPont Smith from "transferring any assets from any account of Lewis duPont Smith until further order" of the Court and scheduled a hearing for April 26, 1985. On May 1, 1985, on respondents' unopposed motion, the Court directed petitioner to present himself for psychological examination by Dr. David Halperin, M.D.

After an eight-day hearing, the trial court on November 12, 1985, entered a Decree Nisi finding petitioner to be "incompetent within the meaning of 20 Pa.C.S.A. 5501" and concluding that petitioner "by reason of mental illness, is unable to manage his property; or is liable to dissipate it or become the victim of designing persons." (Pet. App. at 26a).[2] The court appointed a guardian other than a member of petitioner's family.

---

1. In addition to filing a Petition for Adjudication of Incompetency and Appointment of a Guardian for the Estate of the Incompetent, respondents filed a petition for a preliminary injunction, requesting that petitioner be restrained from transferring his assets to organizations affiliated with Lyndon LaRouche ("LaRouche").

Petitioner also commenced related litigation in the United States District Court for the Eastern District of Pennsylvania, which dismissed the action. Petitioner did not appeal that dismissal. *Smith* v. *Wood*, 649 F.Supp. 901 (E.D. Pa. 1986).

2. References herein to the Petition are denoted by the abbreviation "Pet." followed by the page number. References to the Appendix to the Petition are denoted "Pet. App." followed by the page number of that Appendix.

The heir to a substantial estate, Lewis duPont Smith had, prior to the institution of this proceeding, squandered a considerable portion of it in a series of highly speculative, "ill advised" investments. In 1981, he lost an $80,000 investment in the American Walnut Corporation. In May of that year, he lost over $23,000 in silver bullion. In a two-month period beginning in March, 1984, he invested roughly $74,000 in various stocks, all but $22,000 of which he lost.

In the spring of 1983, he purchased magazines published by a LaRouche-affiliated organization and had his first of several conversations with a LaRouche supporter staffing an airport sales table. Several months later, he was approached by one David Goldman ("Goldman"), ostensibly a "financial adviser," who attempted to solicit a "loan" from him on behalf of a company known as Caucus Distributors, Inc. ("CDI"), a LaRouche-affiliated organization.

During the following year, organizations dominated by LaRouche maintained periodic contact with Lewis. In the summer of 1984, Lewis vacationed at his family's summer home in Maine. Although he had not furnished them with his Maine summer address, representatives of the LaRouche organizations successfully tracked him down, obtained his telephone number, and telephoned him there again for the purpose of soliciting money from him. His brother, Henry, who was with him in Maine, testified that Lewis initially resisted these overtures and "felt as [though] he was violated, his rights were violated; he was very upset that they traced his location to Maine because he had not told them that he was up in Maine." Lewis told Henry, in August 1984, that LaRouche was "off the wall" and that there was "no way" that he, Lewis, would support LaRouche.

A month later, Goldman began to telephone Lewis "every night", sometimes calling "two or three times a night" to solicit money for LaRouche. Lewis was warned by his roommate that Goldman was "an idiot" and

cautioned him that Goldman was trying to "take you for all you're worth." Lewis agreed. Nonetheless, LaRouche operatives later succeeded in inducing him to attend a series of "lectures" at the Schiller Institute, an arm of the LaRouche organization. In late 1984 and early 1985 he became "deeply involved" in LaRouche's organization, experienced "nightmares" and became "extremely withdrawn, tense, up tight [and] nervous." He underwent a personality change, lost weight, suffered from depression, and began to parrot LaRouche's "philosophy".

He also began to make sizeable "contributions" to LaRouche's CDI. In a four-week period commencing in February, 1985, he transferred $42,000 to CDI. On one day, March 20, 1985, Lewis made two separate $50,000 wire transfers to CDI, and received an unsecured promissory note in the amount of $142,000. When asked by his family about these transactions, Lewis stated that he had "loaned" CDI this money. At the hearing in this matter, however, he disclaimed any interest in being paid back.

Lewis later denied having provided CDI with any additional financial support. However, records showed that, on April 2, 1985, two weeks after he had made the two $50,000 wire transfers, he had given CDI an additional $20,000, and on April 4, 1985, an additional $50,000 contribution. When reminded of these additional contributions, he was unable to say whether they were loans or gifts. He stated that $20,000 of the $70,000 "gift" was secured by an undeposited, postdated check, but, in response to inquiries by the Court during the hearing, he was unable to "come up with a reasonable explanation as to what" the $50,000 represented because he was "a little bit confused." In addition to this $70,000 "gift," Lewis also paid over $17,000 to LaRouche-affiliated organizations for magazine subscriptions and "tutorial" instructions. Although Lewis initially believed that he had given (or "loaned") a total of

$144,000 to LaRouche-affiliated organizations, he had, in fact, transferred to them a total of $212,000.

On April 7, 1985, Lewis told his brother that he did not intend to give any further money to LaRouche organizations. Three days later, he attempted to wire transfer $75,000 to Capital Investment Group ("CIG"), another LaRouche-affiliated entity.

Lewis' behavior during this period had also become increasingly bizarre. He penned a rambling, nonsensical letter to his brother in which he described Mrs. Gorbachev as the "Bo Derek of the steps [sic] to Central asia" and charged that "Paul Adolph Volker" had "creat[ed]" an economic recovery to satisfy his "pederastic, oligarchical whims." He signed the letter "Lewis (Alius [sic] your neo-platonic, republican, polemical brother, Socrates)."

Alarmed by Lewis' behavior and the steady dissipation of his assets, respondents instituted this action on April 11, 1985.

Pursuant to court order in this proceeding, Dr. David A. Halperin, a psychiatrist who has written extensively on the psychodynamics of cults and cult recruiting, conducted a lengthy and complete mental competency examination of Lewis, consulted with Lewis' family, reviewed Lewis' writings and was present when Lewis testified in Court and observed his demeanor and responses. At the hearing in the trial court, Dr. Halperin testified that in his opinion, Lewis is mentally ill and suffers from a schizophrenic affective disorder as defined by the Diagnostic Statistical Manual, 195.70 ("DSM III"), the authoritative reference work used by the psychiatric profession. According to Dr. Halperin, Lewis' mental illness exhibits both a psychotic component and an affective disorder which renders him unable to appreciate reality or to relate to it in any method other than in an "inappropriate and disfunctional fashion." He suffers "delusions of persecution," evident in his frequent references to his being "at risk" and in his belief

that his "life [is] in danger." He manifests the traditional symptoms of a "paranoid individual." In support of this diagnosis, Dr. Halperin pointed to Lewis' use of "magical words," his adoption of grandiose pseudonyms, and his drawings exhibiting a psychotic process, and testified that Lewis suffers from a "gross loss" of his sense of self, that his ego is grossly diminished and that he is "fragile." Lewis' affective disorders are manifested in his periodic depression and support a "secondary diagnosis of mixed organic mental disorder." Lewis' organic brain disorder[3] was confirmed at the hearing when Lewis was asked to count backwards from one hundred by threes, and was unable to do so.

On the basis of his entire examination of Lewis and Lewis' performance in Court, Dr. Halperin unequivocably found that Lewis suffers from a "mental illness" which makes him unable to manage his property, liable to dissipate it or to become the victim of designing persons.

Two doctors who testified on Lewis' behalf agreed that he suffers from a personality disorder *i.e.*, a "mental disorder". One agreed that Lewis' mental disorder could make him more likely than most to be the subject of designing persons because he is more vulnerable and helpless than most and because he is easily influenced, and further agreed that he has the type of "ego weakness" that is consistent with the diagnosis of schizophrenia. A second doctor diagnosed Lewis as suffering from a "schizotypal" mental disorder, agreed that Lewis suffers from "organic brain damage," and further agreed that, "under proper stress," Lewis could suffer from "episodes of schizophrenia."

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3. As Petitioner's Prehearing Memorandum in the trial court admitted, Lewis also has "a record of congenital dyslexia (impairment of the normal ability to read, due to a defect in the brain)." (Prehearing Memorandum at 2).

The trial court found by clear and convincing evidence that petitioner suffers from a "mental illness" and for that reason is "unable to manage his property, or is liable to dissipate it or become the victim of designing persons." (Pet. App. 26a).

B. Proceedings in the Pennsylvania Superior Court.

Petitioner filed an appeal to the Superior Court of Pennsylvania, which, after briefing and oral argument, affirmed the trial court's judgment on July 21, 1987. In its opinion, the Superior Court held that "the trial court acted within its sound discretion in finding that [respondents] proved [petitioner's] mental illness by clear and convincing evidence." (Pet. App. at 9a). The Superior Court took note of the expert psychiatric testimony that petitioner suffers from "a schizophrenic affective disorder which renders him unable to appreciate reality as to relate to it in any way other than in an 'inappropriate and disfunctional fashion' "; that petitioner suffers delusions of persecution; and that "[b]ecause of this mental illness, [petitioner] cannot objectively judge those who say that they share his common ideology thus making it very easy for [petitioner] to get swept up in his colleagues' ideas that are of a financial nature." (Pet. App. at 9a).

The Superior Court specifically rejected petitioner's contention that the trial court had made a finding only of a "mental *disorder*" not a finding of "mental illness," as required by the Act, and pointed to the trial court's specific finding of "mental *illness*." (Pet. App. at 10a; 26a). The Court also rejected petitioner's contention that the evidence showing that he was liable to dissipate his property or become the victim of designing persons did not satisfy the "clear and convincing evidence" standard. The Superior Court also held that the trial court did not err in concluding that the Act "is designed to protect one who has been peculiarly disabled by his or her mental make up from resisting the exploitation of

others," that in this case "[t]he evidence indicate[d] that the exploitation has already begun," that the fact that these events had already transpired was some evidence that petitioner was liable to dissipate his property, and that "unless the Court intervene[d], Lewis will continue to squander his admittedly substantial resources." (Pet. App. at 11a).

In a concurring opinion, Judge Beck observed that "the incompetency statute was not applied in a discriminatory fashion" (Pet. App. at 14a), and noted petitioner's "convict[ion] in federal court of assaulting in an airport an individual who had questioned LaRouche's policies." (Pet. App. at 16a). The concurring opinion also referred to the testimony of petitioner's own psychiatric expert that by reason of petitioner's mental disorder "he's more likely to be influenced, conned, if you will, than the average individual." (Pet. App. at 16a).

C. Denial of Allowance of Appeal to the Supreme Court of Pennsylvania.

Petitioner's petition for allowance of appeal to the Supreme Court of Pennsylvania, was denied by that Court by Order dated January 21, 1988.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER FAILED TO FOLLOW VALID STATE PROCEDURES IN CHALLENGING THE CONSTITUTIONALITY OF THE PENNSYLVANIA GUARDIANSHIP ACT IN THE LOWER COURTS, AND THIS COURT IS THEREFORE WITHOUT JURISDICTION

None of the three constitutional questions presented in the Petition is properly before this Court, and the Court therefore lacks jurisdiction under 28 U.S.C. § 1257 to review the judgment below.

In order properly to present a federal question in this Court a litigant must comply with reasonable state

procedures for raising such an issue in the state courts. Failure to do so will prevent review by this Court. *In re Lamkin*, 355 U.S. 59, 2 L.Ed.2d 107, 78 S.Ct. 137 (1957); *Ferguson v. Georgia*, 365 U.S. 570, 572, 5 L.Ed.2d 783, 785, 81 S.Ct. 756, 758 (1961). Thus, this Court will decline to exercise jurisdiction where the highest state court expressly refuses to decide the federal question because of a procedural defect in the manner in which the litigant raised or sought to raise the issue. *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463, 80 L.Ed. 796, 803-804, 56 S.Ct. 556, 561 (1936); *Erie R. Co. v. Purdy*, 185 U.S. 148, 46 L.Ed. 847, 22 S.Ct. 605 (1902). In addition, where a federal constitutional issue was not raised in the trial court, as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediate court, the highest state court's action in refusing without opinion to hear the case precludes review on certiorari by this Court. *Stembridge v. Georgia*, 343 U.S. 541, 547, 96 L.Ed. 1130, 1133-1134, 72 S.Ct. 834, 837 (1952).[4]

Rule 235(a) of the Pennsylvania Rules of Civil Procedure specifically requires that, in any proceeding in a Pennsylvania trial court in which it is asserted that a Pennsylvania statute is unconstitutional and the Commonwealth of Pennsylvania is not a party, the litigant raising the constitutional issue must promptly give notice to that effect by registered mail to the Attorney

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4. The Court's decision in *Cicenia v. La Gay*, 357 U.S. 504, 507-08 n.2, 2 L.Ed.2d 1523, 1527, 78 S.Ct. 1297, 1299 (1958) where the intermediate state appellate court specifically addressed the constitutional argument, does not require any different result in this case. Here the intermediate state appellate court expressly declined to rule on the constitutional arguments because they had not been properly preserved. (Pet. App. at 5a-6a).

General of Pennsylvania.[5] In addition, Rule 521 of the Pennsylvania Rules of Appellate Procedure specifies a similar procedure applicable when a litigant seeks to draw into question the constitutionality of any statute in a Pennsylvania *appellate* court in any manner to which the Commonwealth or any officer thereof is not a party. Rule 521 similarly requires the litigant raising such a constitutional challenge to provide notice to the Attorney General of Pennsylvania.[6] The requirement is a reason-

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5. Rule 235(a) provides:

> Notice to Attorney General.
> Constitutionality of Statute.
>
> (a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice.

6. Pa. R.App.P. 521 provides:

> Rule 521. Notice to Attorney General of Challenge to Constitutionality of Statute.
>
> (a) *Notice.* It shall be the duty of a party who draws in question the constitutionality of any statute in any matter in an appellate court to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question; together with a copy of the pleadings or other portion of the record

able one and parallels a similar federal procedure defined in 28 U.S.C. §2403, which differs only in placing responsibility for providing notice on the courts.

The Pennsylvania appellate courts consistently adhere to the rule that failure to provide such notice in compliance with Pa. R. Civ. P. 235(a) and Pa. R. App. P. 521 will result in the refusal by Pennsylvania courts to address the constitutional issues sought to be raised. *See In the Matter of the Adoption of Christopher P.*, 480 Pa. 79, 90, 389 A.2d 94, 100 (1978); *Wiegand v. Wiegand*, 461 Pa. 482, 337 A.2d 256 (1975); *Fetterhoff v. Fetterhoff*, 354 Pa. Super. 438, 444, 512 A.2d 30, 33 (1986); *Faust v. Messinger*, 345 Pa. Super. 155, 159, 497 A.2d 1351, 1353 (1985).

In this case, petitioner admits (Pet. 9-10) that no notice was ever provided, as required by Pa. R. Civ. P. 235(a) and Pa. R. App. P. 251, until petitioner filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. The suggestion in the petition (Pet. at 9) that this rule did not apply because petitioner's arguments were framed solely in "syllogistic form" is belied by the Superior Court's observation (Pet. App. at 5a) that petitioner specifically raised the question in that court "whether the competency statute is constitutional on its face." Petitioner's brief in the Superior Court did raise a facial challenge and articulated the circumstances in which "[a] classic definition of overbreadth declares a statute facially void. . . ." (Brief for Appellant in the Superior Court, at 47). Thus, petitioner was not relieved of the obligation to comply with the Pennsylvania rules in this case. The Superior Court of Pennsylvania, as it

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raising the issue, and to file proof of service of such notice.

(b) *Status of Attorney General.* The Attorney General may be heard on the question of the constitutionality of the statute involved without formal intervention. If the Attorney General files a brief concerning the question the Commonwealth shall thereafter be deemed to be an intervening party in the matter.

stated in its opinion below, "*decline[d] to address [the constitutional] issues as [petitioner] did not give notice to the Attorney General of Pennsylvania as required by Pa. R. A. P. 521.*" (Pet. App. 5a-6a).

Since Petitioner has failed properly to raise and preserve any of the constitutional questions sought to be raised in the Petition, the Petition should be denied.[7]

II. THE PENNSYLVANIA GUARDIANSHIP ACT DOES NOT VIOLATE THE FIRST AMENDMENT ON ITS FACE OR AS APPLIED.

Pennsylvania's Guardianship Act is modelled on the Uniform Probate Act. Similar statutory provisions are in effect in numerous other states. Guardianship provisions for persons of unsound mind have a long history,[8] and

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7. Petitioner has manifestly failed to support his suggestion that "the Superior Court's refusal to deal with petitioner's federal arguments was a mere evasion of the issues and also was utilized in a manner which unfairly discriminated against the assertion of petitioner's federal claims." (Pet. at 10). The non-precedential plurality opinion in *Commonwealth ex rel. Stein v. Stein*, 487 Pa. 1, 7-8, 406 A.2d 1381, 1384-1385 (1979), cited by Petitioner as an instance in which compliance with these procedural rules was not required, did not create an exception that is applicable here. The *Stein* case is clearly distinguishable. In *Stein*, "the Attorney General *was* duly notified of petitioner's claims on appeal of the matter to the Superior Court and to [the Supreme Court of Pennsylvania]." Thus, the rule has not been applied to petitioner in discriminatory fashion in this case, in which notice was not given to the Attorney General on appeal to the Superior Court.

Nor is there contrary holding in this Court's decisions in *Rogers v. Alabama*, 192 U.S. 226, 48 L.Ed. 417, 24 S.Ct. 257 (1904), in which the Alabama lower court refused to reach the constitutional issue of exclusion of blacks from the jury because of "prolixity" of defendant's two-page trial court motion to quash the indictment, or *Nickel v. Cole*, 256 U.S. 222, 65 L.Ed. 900, 41 S.Ct. 467 (1921), in which the lower state court had adopted a plainly untenable view of a written instrument to evade the constitutional issue.

8. Maitland traces legal guardianship for "lunatics" and "idiots" to the *Praerogativa Regis* of the time of Edward I. 1 Pollock

they serve a legitimate and important state interest. The power of the states to provide in this fashion for the health and welfare of their citizens is well-established. Petitioner points to no case in which their constitutionality has ever been doubted. In fact, as petitioner candidly admits, the constitutional arguments in this case are issues of "*first impression*." (Pet. at 11).

The Act contains significant safeguards against misapplication. The Pennsylvania courts have erected a presumption of mental capacity and competency and have required "clear and convincing evidence" of mental incompetency to warrant appointment of a guardian under §5501. *Matter of Caine*, 490 Pa. 24, 415 A.2d 13 (1980). That standard was applied by the lower courts in this case. (Pet. App. at 7a, 25a). Moreover, the statute is narrowly tailored to reach its object. Under the Act, a guardian may not be appointed merely because a person lacks the ability or experience needed to manage large sums of money. *In re Estate of Porter*, 463 Pa. 411, 345 A.2d 171 (1975). Nor does it suffice simply to show mental illness. The guardianship procedure does not apply to *all* cases of mental illness. Rather, the statute requires proof of three concurrent elements (1) that the alleged incompetent suffers from "mental illness" infirmities of old age, mental deficiency or retardation, drug addiction or inebriety, (2) that the alleged incompetent is "unable to manage his property or is liable to dissipate it or become the victim of designing persons," and, most importantly, (3) that the inability to manage his or her property *results from* the mental condition required by the statute to be shown. *Matter of Caine*, *supra*.

& Maitland, The History of English Law 481; 1 W.S. Holdsworth, A History of English Law 473. Similar guardians (*cura furiosi*) are known to have existed under Roman Law. W.W. Buckland, Textbook of Roman Law from Augustus to Justinian (3d ed.) 168.

These three statutory elements together provide a clear and objective standard which is sufficiently definite to survive constitutional scrutiny. Moreover, the Pennsylvania statute and similar statutes in other jurisdictions have been subjected to decades of case-by-case judicial interpretation. As a result, there is a well-developed body of judicial interpretation of the statutory terms — a circumstance adding further certainty in their administration and tending to undermine any contention that the Act is unconstitutionally vague. *See, United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 568-581, 37 L.Ed.2d 796, 810-818, 93 S.Ct. 2880, 2892-2898 (1973).

Petitioner's facial vagueness and overbreadth arguments are without substance.

A. The Guardianship Act Is Not Overbroad.

The State's legitimate interests in protecting the financial resources of incompetents are well-established and substantial. They include not only the state's interest in protecting its fisc by minimizing the number of persons who become charges of the state, but also its interest in providing for the welfare of incompetent persons. The Act is narrowly tailored to serve these legitimate state interests. It addresses only the subject which lies within the State's traditional and legitimate legislative powers to protect the welfare of citizens suffering from mental illness that makes them vulnerable to dissipating their assets and likely victims of designing persons. Nor does the Act establish an impermissible content-based restriction of protected activities.[9] The Act is not overbroad at all.

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9. The Act is not a criminal provision, which "must be scrutinized with particular care." *City of Houston v. Hill*, 482 U.S. ___, 96 L.Ed.2d 398, 107 S.Ct. 2502, 2508 (1987); *Winters v. New York*, 333 U.S. 507, 517, 92 L.Ed. 840, 68 S.Ct. 665, 670 (1948). The

A facial overbreadth challenge to a statute, moreover, must fail where the enactment does not reach "a substantial amount of constitutionally protected conduct." *Boos v. Barry*, ____ U.S. ____, 99 L.Ed.2d 333, 108 S.Ct. 1157, 1169 (1988); *City of Houston v. Hill*, 482 U.S. ____, 96 L.Ed.2d 398, 107 S.Ct. 2502, 2508 (1987); *Hoffman Estates v. The Flipside*, 455 U.S. 489, 494, 71 L.Ed.2d 362, 369, 102 S.Ct. 1186, 1191 (1982). Measured by this applicable standard, Petitioner's facial overbreadth challenge is plainly without merit.

Even if it is assumed that speech and expressive activities of an adjudicated incompetent suffering from a "mental illness" are entitled to the full protection of the First Amendment,[10] the Act does not touch conduct that lies at the core of the First Amendment. It does not restrict an adjudicated incompetent from engaging in classically political speech or association, such as reading, writing, publishing, speaking, circulating publications of any nature, attending meetings of political or social organizations or the like. The guardianship procedure involves only a limitation on the incompetent's disposition of his or her funds. Insofar as appointment of a guardian under the Act may therefore result in some incidental restriction on direct or indirect contributions

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Court has expressed "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Estates v. Flipside*, *supra*, 455 U.S. at 498-499, 71 L.Ed.2d at 371-372, 102 S.Ct. at 1193.

10. The Court has intimated that the protection of the First Amendment does not extend to its fullest degree to expressive activities of minors, although minors are still "entitled to a significant measure of First Amendment protection." *Tinker v. Des Moines School District*, 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969). The same rationale may also apply to incompetents, at least where the activities threaten their welfare by depleting their assets and, as the trial court found in this case, the incompetent "no longer has the ability to 'choose' in either a knowledgeable or totally voluntary way." (Pet. App. at 25a).

of money, gifts and loans to political parties, candidates or social and political causes, the Act affects only conduct that does not enjoy the same degree of First Amendment protection which extends to speech and other activities that lie at the core of the First Amendment's protection.

In *Buckley v. Valeo,* 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), involving the constitutionality of expenditure and contribution limitations of the Federal Election Campaign Act, the Court drew a sharp distinction between those statutory provisions of the FECA that directly limit *speech* and the FECA's statutory limitations on political *contributions*. The Court said:

> "[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee *entails only a marginal restriction upon the contributor's ability to engage in free communication*. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 20-21, 46 L.Ed.2d at 688-689, 96 S.Ct. at 635.

As the Court also pointed out, "[a] limitation on the amount of money a person may give to a candidate or campaign organization *thus involves little direct restraint on his political communication. . . .*" 424 U.S. at 21, 46 L.Ed. 2d at 689, 96 S.Ct. at 636.

The Pennsylvania Guardianship Act does not reach a substantial amount of constitutionally protected conduct, if any, and the conduct that the Act may incidentally affect does not lie at the core of the First Amendment. To the extent the Act incidentally touches *any* protected activity, it entails only a "marginal restriction upon the contributor's ability to engage in free communication" and is not substantially overbroad.

B. The Guardianship Act Is Not Unconstitutionally Vague.

The Act likewise is not unconstitutionally vague. It does not proscribe any willful and voluntary conduct. The Act does not erect a standard for regulation of or sanction for conduct. Rather, a person is subject to guardianship procedures if he or she possesses the specific characteristics defined by the statute. As such, many of the usual concerns regarding vague statutes do not exist in this case, and "no necessity exists for guidance so that one may avoid the applicability of the law." *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118, 123-24, 18 L.Ed.2d 661, 666, 87 S.Ct. 1563, 1566-67 (1967). The Act can therefore have no "chilling effect" on the exercise of First Amendment rights.

The subject-matter of the Act does not lend itself to mathematical precision, nor is it required. As the Court has acknowledged, "[t]he subtleties and nuances of psyciatric diagnosis render certainties beyond reach in most situations," *Addington v. Texas*, 441 U.S. 418, 430, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323, 333 (1979). A statute will not be invalidated as vague simply because it is difficult to determine whether certain marginal instances fall within its language. *Jordan v. DeGeorge*, 341 U.S. 223, 231, 95 L.Ed. 886, 71 S.Ct. 703, 708 (1951). No more than "a reasonable degree of certainty is required." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 96 L.Ed. 367, 72 S.Ct. 329, 331 (1952). The Act satisfies these standards of clarity and precision.

Each of the statutory terms, moreover, has a well-established meaning. Used in conjunction, they jointly attain even greater clarity and precision by mutual elimination of potential ambiguities. Thus, the meaning of the term "mental illness" in the Act is qualified and clarified by its use in conjunction with the terms "unable to manage his property," "liable to dissipate it,"

and "become the victim of designing persons." In addition, one of the Act's key operative terms, "mental illness," has repeatedly been held not to be unconstitutionally ~~vague in~~ statutes defining the criminal defense of mental illness and in statutes relating to termination of parental rights on grounds of mental illness.[11]

The Act is not unconstitutionally vague.

C. The Guardianship Act As Applied To Petitioner Does Not Violate The First Amendment.

The Act was not unconstitutionally applied in this case. Relying on eight days of psychiatric expert testimony, the results of extensive psychological examination, review of petitioner's writings, detailed scrutiny of the manner in which petitioner attended to his personal finances, the testimony of family members and the court's own observation of him in the courtroom, the

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11. *See In the Matter of the Appeal in Maricopa County Juvenile Action No. JS-5209 and No. JS-4963*, 143 Ariz. 178, 692 P.2d 1027 (Ariz. Ct. App. 1984) ("mental illness"); *People v. Lakey*, 102 Cal.App.3d 962, 162 Cal.Rptr. 653 (1980) ("mental disorder"); *In the Matter of Salem*, 31 N.C.App. 57, 228 S.E.2d 649 (1976) ("mental illness"); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980) ("mentally ill persons"); *In re Beverly*, 342 So.2d 481 (Fla. 1977); *In re Mark K. v. Harold K.*, 159 Cal.App.3d 94, 205 Cal.Rptr. 393 (1984) ("mental illness"); *Cooper v. State*, 253 Ga. 736, 325 S.E.2d 137 (1985) ("mentally ill"); *People v. Lang*, 113 Ill.2d 407, 498 N.E.2d 1105 (1986) ("mental illness"); *Smith v. State*, 486 N.E.2d 465 (Ind. 1985) ("mentally ill"); *F.J. v. State*, 411 N.E.2d 372, 78 Ind. Dec. 454 (Indiana App. 1980) ("mentally ill"); *In the Matter of T.C.F.*, 400 N.W.2d 544 (Iowa 1987) ("mental illness"); *In the Matter of Everette Elizabeth Gentry v. Gentry*, 142 Mich.App. 701, 369 N.W.2d 889 (1985) ("mental illness"); *People v. Deyampert*, 140 Mich.App. 530, 364 N.W.2d 373 (1985) ("mental illness"); *In re Interest of D.L.H. v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (Neb. 1977), *In the Matter of Sylvia M.*, 82 A.D.2d 217, 83 A.D.2d 925, 443 N.Y.S.2d 214 (1981) ("mental illness"); *In re Roger C. Ryan*, 97 Wash.2d 284, 644 P.2d 675 (1982) ("mental illness" and "mental incapacity").

trial court, employing the standard of "clear and convincing" evidence, found that Lewis duPont Smith was a person who because of mental illness "is unable to manage his property, or is liable to dissipate it or become a victim of designing persons." (Pet. App. at 26a). In appointing a guardian, the trial court in no way limited petitioner's right "to speak, believe, or associate with others." (Pet. App. at 18a). The trial court "only limited [petitioner's] use of his money to the extent necessary to prevent him from dissipating his assets to any substantial degree." (Pet. App. at 18a).

The trial court's ruling struck the appropriate balance between any First Amendment interests of an adjudicated incompetent, suffering from mental illness and highly vulnerable to manipulation, and the important protective purpose of the Act. The trial court's appointment of a guardian under the Act was narrowly fashioned to make the least possible intrusion on petitioner's activities, and the appointment of a guardian directly and substantially advances the legitimate and important objectives of the Act.

The Act was not unconstitutionally applied in this case.

III. NO CONFLICT AMONG THE CIRCUITS OR THE STATE COURTS REQUIRES THIS COURT'S REVIEW OF STATE GUARDIANSHIP STATUTES.

As petitioner concedes, "[t]his is a case of first impression." (Pet. at 11). Petitioner has made no showing that the insubstantial constitutional questions sought to be presented in the Petition have divided the courts of appeals or the state appellate courts. Petitioner points to no substantial body of decisional law or commentary that addresses the questions raised in the petition, and the issues do not otherwise warrant this Court's attention.

Moreover, in this case, in which the lower courts have declined to address the constitutional issues raised in the Petition, it would be inappropriate and contrary to this Court's settled practice to grant certiorari to decide in the first instance issues which have not been decided by the lower courts. *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L.Ed.2d 826, 837, 96 S.Ct. 2868, 2877 (1976); *Youakim v. Miller*, 425 U.S. 231, 234, 47 L.Ed.2d 701, 705, 96 S.Ct. 1399, 1401 (1976).

No satisfactory reason exists to depart from that practice in this case.

CONCLUSION

The petition is an attempt to induce review on insubstantial constitutional issues of "first impression" that were not properly preserved in the state courts below, and which for that reason were not decided below.

The petition should be denied.

Respectfully submitted,

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